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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1216

NATIONAL ASSOCIATION OF RADIOTELEPHONE SYSTEMS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, the National Association of Radiotelephone Systems ("NARS"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") entered in this proceeding on January 5, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been officially reported,[1] appears at Appendix A to this petition.[2] The Second Report and Order of re-

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[1] The opinion is reported at 35 Pike & Fischer Radio Reg. 2d 1484 (1976).

[2] The appendices are separately bound in a companion volume, hereinafter cited as "Pet. App." The opinion appears at Pet. App. 1a-33a.

spondent Federal Communications Commission (the "FCC"), which is reported at 46 F.C.C. 2d 752 (1974), appears at Appendix B (Pet. App. 34a-134a); its Memorandum Opinion and Order on reconsideration, reported at 51 F.C.C. 2d 945 (1975), appears at Appendix C (Pet. App. 135a-266a); and its Memorandum Opinion and Order denying further reconsideration, reported at 55 F.C.C. 2d 771 (1975), appears at Appendix D. (Pet. App. 267a-273a).

JURISDICTION

The judgment of the Court of Appeals (Opinion by Wilkey, Cir. J.) was entered on January 5, 1976, and this petition for writ of certiorari is filed within 90 days of that date. The Court of Appeals, upon motion of this petitioner and after considering the FCC's brief in opposition, granted a stay of its mandate pending the filing of this petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

The Monopoly Issues

(a) AT&T and the Cellular System

1. Whether the Court of Appeals erred in affirming a rulemaking order of the FCC disposing of a vast band of the radio spectrum on a basis such that, as the Court of Appeals found, American Telephone and Telegraph Company ("AT&T") "appears likely to dominate substantially the field of radio telephone service, which has heretofore been occupied in significant part by radio common carriers operating in a highly competitive environment," or whether the rulings violate the antitrust component of the "public

convenience, interest, or necessity" standard of the Communications Act (the "Act") (47 U.S.C. § 303)?

2. Whether the Court of Appeals erred in affirming a rulemaking order of the FCC which, as the Court of Appeals found, enhances AT&T's monopoly power by "elimination of a requirement that wireline operators [AT&T and associated telephone companies] offer to interconnect radio common carriers into their systems," or whether the rulings violate the "public interest" standard of the Act, *supra*?

3. Whether the Court of Appeals erred in affirming a rulemaking order of the FCC which will enhance AT&T's monopoly position, as the Court of Appeals found, by authorizing it to "become a significant force in the now highly competitive market for private dispatch services"?

(b) Motorola and the Non-Cellular Operators (SMRS)

4. Whether the Court of Appeals erred in affirming a rulemaking order of the FCC which, for the first time in the more than 30-year history of the industry, authorizes radio equipment manufacturers (especially Motorola, Inc., which, as the Court of Appeals finds, "enjoys substantial domination of the sales market for mobile radio systems") to obtain licenses and operate on a vertically-integrated basis in competition with small radio common carriers which must rely upon them for equipment—an FCC action which the Court of Appeals finds "could discourage competition"?

(c) The RCCs

5. Whether the Court of Appeals erred in affirming a rulemaking order of the FCC allocating nearly

three times the total radio spectrum now available for land mobile radio service on a basis which effectively excludes the independent, regulated radio common carriers from access thereto and which will virtually eliminate them as competitive factors in the service?

The Common Carrier Issue: Deregulation

(a) Deregulation

6. Whether the Court of Appeals erred in affirming a rulemaking order of the FCC decreeing that the common carrier provisions of the Act will not apply to non-cellular land mobile radio service to be provided to the public in the newly authorized spectrum on an "entrepreneurial," for-hire, for-profit basis, or whether this deregulation is contrary to the explicit provisions of the Act (47 U.S.C. § 153(h))?

(b) Definition of Common Carrier

7. Whether the Court of Appeals erred in holding that entrepreneurs authorized to provide service to the public on a for-hire, for-profit basis are not common carriers as defined by the Act and are not subject to the regulatory provisions of the Act and of state laws, on the grounds that these entrepreneurs may elect not to serve the public?

The Preemption Issue

8. Whether the Court of Appeals erred in affirming the Commission's order decreeing the "preemption" of state regulatory jurisdiction, despite the fact that the Act expressly vests regulatory authority in the states (47 U.S.C. §§ 152(b) and 221(b))?

The Judicial-Review Issues

9. Whether the Court of Appeals erroneously departed from the fundamental *Chenery* rule (*SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943)) by affirming the Commission's deregulation order on the grounds that the licensees are free to refuse to serve the public: grounds which were neither stated nor considered by the Commission and which contradict the Commission's design for providing service to the public.

10. Whether the Court of Appeals erred in refusing to set aside the Commision's order on the grounds that the monopoly and common carrier issues could be the subject of "future challenge" and private litigation?

STATUTORY PROVISIONS INVOLVED

Federal Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (1970); Federal Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970). Relevant sections of the statutes are set out in Appendices E and F, respectively. (Pet. App. 274a-293a).

STATEMENT OF THE CASE

In this case, petitioner seeks review of a decision of the Court of Appeals which affirms, *in toto,* an order of the FCC allocating for the mobile radio services a vast amount of the limited radio spectrum and establishing rules for licensing the use of such spectrum.

A. Background

1. *Identity of Petitioner.* Petitioner is the national trade association representing the approximately 550 independent radio common carriers ("RCCs"), described hereinafter.

2. *The Service Involved.* This case involves the land mobile radio communications service: i.e., the use of radio signals for communications between fixed transmitting (base) radio stations and moving vehicles, or between moving vehicles themselves. There are presently about four million users of the land mobile radio service. It is of great and growing importance to business and industry and to public services and agencies such as police and fire departments. The spectrum heretofore assigned to the service is approaching exhaustion due to the phenomenal growth of its use.

The service was in existence prior to the Communications Act of 1934. It was expressly defined and included in the Act,[3] along with telephone, cable and other wireless and radio service; and it is subject to the comprehensive regulatory scheme of the Act designed to control the use of radio frequencies and to provide for regulation of the service.

The service takes three forms:

a. "General" (or radiotelephone) service, which involves two-way radiotelephone communications between ordinary telephones and mobile transmitter/receivers (usually located in a car or truck). 47 C.F.R. § 21.1 (1974). This service requires interconnection of the radio facilities with the nationwide telephone network of AT&T and associated telephone companies.

b. "Dispatch" service, which involves two-way radio communications (such as used by taxicab companies, utilities, delivery and service companies) between mobile transmitter/receivers and either (1) a

[3] 47 U.S.C. §§ 153(1), (m) and (n) (definitions of "mobile station," "land station" and "mobile service").

fixed location transmitter/receiver or (2) other mobile units. 47 C.F.R. § 21.1 (1974).

c. "Signaling" (or paging) service (excluded from this case by the FCC), which involves a one-way radio communication to a small portable receiver carried by persons. 47 C.F.R. § 21.1 (1974). The "beepers" carried by physicians or repairmen alerting them to call their offices are examples of this service.

3. *The Participants in the Service.* The design of the Communications Act, heretofore implemented by the FCC regulations, provides that licensed mobile radio service may be provided in one of two ways: to the public by common carriers; to an individual user or a cooperative group of users by licensing for their private, not-for-hire, non-profit use. No provision is made for service to the public which does not own and operate its own system, either individually or cooperatively, except by regulated common carriers.

a. *The Common Carriers:* The telephone industry has historically provided land mobile radio service as an adjunct to ordinary telephone service. Local telephone companies are separately licensed by regulatory authorities for this purpose.

The non-telephone company carriers engaged in this service are the radio common carriers represented by petitioner. There are about 550 RCCs located throughout the United States. Despite their great importance in providing service (see *infra*), the RCCs are small, independent entrepreneurial enterprises not affiliated with the telephone, telegraph, private line microwave or domestic satellite industries, or with any other form of communications common carriage. Many of them are outgrowths of small "mom and pop" telephone

answering services. A recent study showed that 67 percent of the RCCs in 1973 had gross annual revenues of $0-$50,000. There are a few RCCs of substantial size.[4] The RCCs, as well as the telephone companies, are licensed and regulated as common carriers in the Domestic Public Land Mobile Radio Service ("DPLMRS")[5] by the FCC, and by state regulatory authorities.[6]

b. *The Private Users.* FCC rules provide that land mobile radio service users, instead of obtaining service from the common carriers, may obtain a license and operate mobile radio systems for their own private use. Many private users have availed themselves of this option, either on a single or cooperative basis. Private operations must be on a not-for-hire, "non-profit," "non-common carrier" basis as explicitly provided in the detailed rules of the Commission. 47 C.F.R. Parts 89, 91 and 93 (1973). Obviously, private users are not subject to common carrier regulation as to rates, services, etc, and the rules, until the present orders, have been carefully designed to forbid their offering service to the public.

c. *Basis of Participation.* The Act gives the FCC comprehensive control over the allocation and use of the radio spectrum. Both common carriers and private users must obtain licenses from the FCC for the radio frequencies which they may use in a given area.

[4] According to the study, 1.9 percent of the RCCs had gross annual revenues in excess of $400,000. *Perrin Affidavit,* Exhibit 5F to petitioner's Motion for Stay to the Court of Appeals, filed May 6, 1975.

[5] 47 C.F.R. § 21.500, *et seq.* (1974).

[6] All but five states have applicable regulatory laws: Connecticut, Iowa, New Jersey, Oregon and Rhode Island. Where no state law is in effect, the Act permits regulation of rates, practices and services by the FCC.

47 U.S.C. § 301. Due to the relatively limited range of the radio equipment employed (about 25-30 miles), land mobile radio operations are "intrastate". Under the Act, these operations are classified as "intrastate" even if a portion of the service is interstate or foreign communication and even if interconnected with the telephone network. 47 U.S.C. §§ 152(b), 153(e), 221(b).

The Act requires that common carriers must charge rates which are just and reasonable, must serve all upon reasonable request, must avoid discriminations and preferences, etc. 47 U.S.C. §§ 201, 202. None of these requirements is applicable to non-common carriers.

Apart from the procedures and prohibitions of the federal Act, the common carriers, under the specific provisions of the Act, are subject to the exclusive jurisdiction of state commissions as to "charges, classifications, practices, services, facilities, or regulations," where jurisdiction is exercised under state law. 47 U.S.C. §§ 152(b) and 221(b).[7]

4. *The RCCs.* Pursuant to their licenses from the FCC and state authorities, RCCs operate base radio station facilities and mobile radio units which they purchase or lease from manufacturers and supply to their customers for such radiotelephone and dispatch services, as well as paging, as the regulatory agencies determine that the public interest, convenience and necessity require. The RCC industry was authorized by

[7] 47 U.S.C. § 221(b) provides that the FCC shall have no jurisdiction "with respect to charges, classifications, practices, services, facilities, or regulations . . . in any case where such matters are subject to regulation by a State commission or by local governmental authority."

the FCC in 1949 for the express purpose of competing with the telephone industry (primarily AT&T and its affiliates) in the provision of common carrier land mobile communications services. *General Mobile Radio Service,* 13 F.C.C. 1190 (1949).

In this competition, the RCCs have been remarkably successful. Despite the handicap that they have been allocated fewer frequencies by the FCC, they serve substantially more mobile units than all telephone companies combined.[8] RCC-served mobile units have been growing at nearly three times the rate of telephone company-served units.[9] In turn, the FCC, in past years, itself has expressly and repeatedly found the competition between RCCs and the telephone industry to be desirable and in the public interest.[10]

In order to become licensed under the plan of the Act, an RCC, as a common carrier, must obtain a certificate of public convenience and necessity from the state commission, where required by state law. 47 C.F.R. § 21.15(c)(4) (1974). It then applies to the FCC for a construction permit and assignment of a frequency. 47 C.F.R. § 21.10 *et seq.* (1974). Quasi-judicial hearings and proceedings are provided for, in the usual form. 47 U.S.C. § 309. If the RCC-applicant obtains a frequency assignment, it then operates under

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[8] See, e.g., Lohr, "Scenario Change Needed for 900 Megahertz Frequencies," *Communicator,* Vol. 17, No. 11 (December 1975), p. 10.

[9] *Ibid.*

[10] E.g., *General Mobile Radio Service,* 13 F.C.C. 1190, 1218 (1949); *General Telephone Company of California,* 21 Pike & Fischer Radio Reg. 19 (1960); *ITT Mobile Telephone Company,* 1 Pike & Fischer Radio Reg. 2d 957 (1963).

the technical supervision of the FCC as to the use of the assigned frequencies and related matters. See 47 C.F.R. § 21.500 *et seq.* (1974). At the same time, it operates under the rates, services and practices supervision of the state and the general requirements of the Communications Act applicable to common carriers, including the requirement as to just and reasonable rates and the mandate to serve the general public "upon reasonable request" and to avoid discrimination—provisions which in practice are principally implemented by state commissions.

5. *AT&T and the Manufacturers (Motorola)*

a. AT&T obviously occupies a key role in the industry. Telephone companies are specially licensed to provide land mobile service, like the RCCs, and directly compete with the RCCs. RCCs are absolutely dependent upon AT&T and associated telephone companies for their radiotelephone business, which requires interconnections between RCC radio facilities and the nationwide telephone network. The attempts of the RCCs to obtain such interconnections on reasonable terms and conditions have been and are a source of continuing controversy and litigation between the RCCs and the AT&T-associated companies. In a pending monopoly antitrust action, the United States Government has expressly charged AT&T with monopolistic and restrictive practices in this field: specifically, with concerted action to "eliminate competition from other telecommunications common carriers" and with "obstruct[ing] the interconnection of Radio Common Carriers with the Bell System." [11]

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[11] *Complaint,* ¶¶ 28(b), 29(c), *United States* v. *American Telephone and Telegraph Company, et al.,* D.C.D.C. Civ. Action No. 74-1698 (Nov. 20, 1974) ("continuing agreement and concert of

Nevertheless, as the Court of Appeals found, the FCC order in this case provides for "significant increases in [AT&T's] market power"; will enable AT&T to "dominate substantially the field of radio telephone service, which has heretofore been occupied in significant part by small radio common carriers operating in a highly competitive environment"; and will enable AT&T to "become a significant force in the now highly competitive market for private dispatch services." (Pet. App. 11a-12a). (Despite these findings, the Court of Appeals affirmed).

b. The RCCs are also totally dependent upon manufacturers of radio communications systems and facilities to supply the base station facilities which they directly operate and also the mobile radio units which RCCs lease or sell to their customers. As the Court of Appeals found, Motorola, Inc., "enjoys substantial domination of the sales market for mobile radio systems" (Pet. App. 30a). Motorola accounts for about 64 percent of the land mobile radio equipment market. The next largest is General Electric Company with about 15 percent. Motorola also directly controls the prime base station antenna sites in many, if not most, of the metropolitan areas across the country.[12] Access to such sites is vital to any RCC.

Manufacturers have never before been vertically integrated, i.e., licensed to operate carrier communica-

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action . . . to prevent, restrict and eliminate competition from other telecomunications common carriers", including, *inter alia*, "attempt[ing] to obstruct and obstruct[ing] the interconnection of Radio Common Carriers with the Bell System").

[12] *Wolf Affidavit*, Exhibit 5C to petitioner's Motion for Stay to the Court of Appeals, filed May 6, 1975.

tions systems in competition with their customers; but are now expressly permitted to do so under the subject FCC order. The Court of Appeals found that Motorola's "size and financial power . . . could discourage competition" and that cause may arise "for independent antitrust actions." (Pet. App. 30a-31a). (The court nevertheless affirmed).

B. The Regulatory Plan of the Communications Act

This petition presents issues arising particularly under Title II of the Communications Act (Common Carriers) and Title III of that Act (Special Provisions Relating to Radio). The Commission's general authority to make allocations and to authorize and issue licenses to use the radio spectrum appears in Title III. 47 U.S.C. §§ 301, 303, 307-309. All participants in the mobile radio communications field are subject to these provisions. Title III prescribes the standard to govern Commission action: "public convenience, interest or necessity". 47 U.S.C. §§ 307 and 309. It requires that applications shall specify the "financial," "character," and other qualifications of the applicant (47 U.S.C. §§ 308(b) and 319); and, among other procedural rights, it guarantees to "any party in interest" the right to file a petition to deny an application and the right to a hearing if "a substantial and material question of fact is presented". 47 U.S.C. § 309. And it includes provisions to prevent or penalize defined activities which are in restraint of trade or which are monopolistic. 47 U.S.C. §§ 313 and 314.

Title II of the Act applies to all communications common carriers, whether by wire or radio. "Common carrier" is defined as "a person engaged as a common carrier for hire". 47 U.S.C. § 153(h). In addition to

the requirement that common carriers must serve all "upon reasonable request therefor" (47 U.S.C. § 201), Title II requires that the charges, practices, etc., of common carriers shall be "just and reasonable," and it outlaws "unjust or unreasonable discrimination in charges, practices," unreasonable preferences by common carriers, etc. 47 U.S.C. §§ 201, 202(a). It provides injured persons with a private remedy for damages resulting from common carrier fault. 47 U.S.C. § 207. It prohibits interlocking directorates among common carriers. 47 U.S.C. § 212.

Jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations" over common carriers in intrastate commerce is exclusively vested in state commissions when such matters are regulated by state law, and Commission authority is explicitly precluded when the states provide for such regulation. 47 U.S.C. § 221(b). The FCC has the right and duty to regulate such matters in the absence of state regulation. *Ibid.*

The Act contains no authority for the Commission to exempt a common carrier from its provisions or from the prescribed regulatory provisions. There is no provision for "contract" carriers: i.e., for carriers to provide for-hire, for-profit service to others on a "non-common" carrier basis. There are only two categories under the Act and the regulations prior to the present order: service to the public, by common carriers; and service for one's own use, either on an individual or cooperative (not-for-hire, non-profit) basis.

C. Proceedings Before the FCC

In the present rulemaking order affirmed by the Court of Appeals, the FCC allocated 115 MHz of the

public domain (i.e., the radio spectrum) in the 806-960 MHz band to accommodate present and anticipated future land mobile service needs to approximately the end of the century.[13] This is nearly *three times* the amount of spectrum heretofore allocated to all land mobile services combined.

1. *AT&T; The Cellular System; Interconnection.* Of the 115 MHz, the FCC allocated 40 MHz for development and licensing of a new and untried common carrier "cellular" mobile radio system, to furnish radiotelephone and dispatch services. It is not scheduled to become operative on a general basis until at least sometime in the 1980s. This is a complex system which has largely been devised by AT&T to provide mobile radio service. As the Court of Appeals found, "AT&T is the likely recipient of a virtual monopoly in the operation of cellular systems". (Pet. App. 11a). The magnitude of this monopoly can be illustrated by the fact that AT&T claims to have spent $20 million on its development to date, and anticipates that additional millions will have to be spent through 1978.

The Commission also relieved AT&T of its obligation to provide interconnections with the telephone system to other radio carriers. (The Court of Appeals characterized this as "somewhat puzzling", saying that "the Commission has given no justification" for it, and that "[a] substantial anticompetitive impact seems almost inevitable". (Pet. App. 12a, fn. 29). (The court nevertheless affirmed).

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[13] This part of the spectrum had previously been reserved for UHF-TV channels, federal government radiolocation operations, broadcast auxiliary services and industrial, scientific and medical equipment.

2. *SMRS; Motorola; Preemption.* The FCC also allocated 30 MHz for non-cellular service to private and all other users, to be operated on a non-common carrier basis; and it kept 45 MHz in reserve. It made no other provision for public use; it refused to make an allocation for common carrier operation (which would have been available for licensing to the RCCs) except for the cellular system. Service to the public, in the newly allocated 30 MHz band, apart from "private users" (which is not at issue in this appeal), is to be provided solely by unregulated "entrepreneurs" operating on a for-hire, for-profit basis, but freed from the substantive and procedural regulatory provisions applicable to common carriers. This newly-invented category is referred to in the Commission's order as "Specialized Mobile Radio Systems" (SMRS).

For the first time in history, the Commission authorized radio equipment manufacturers, including Motorola, Inc., the dominant manufacturer and supplier, to qualify for this service and to enter the field as vertically-integrated entrepreneurs (see *infra*).

As part of its deregulation of this service, the Commission "preempted" state jurisdiction to issue certificates of convenience and necessity as a precondition to entry, on the ground of federal "primacy".[14] It ex-

[14] The FCC originally preempted all state regulation of SMRS (then known as "common user systems"), but on reconsideration it professed to preempt state jurisdiction over SMRS entry into the field—the indispensable basis of state enforcement powers and authority—and to "defer judgment as to any action by the states relating to the regulation of other aspects of SMR operations." (Pet. App. 189a.) It warned, however, that "rate-structured, common-carrier-type regulation is inconsistent with the free-market competitive environment we feel is necessary". (*Ibid.*).

plained its surgical operation on the Act and on state jurisdiction as necessary "to shed this heavy cloak [common carrier provisions of the Act] and exchange it for one with far greater flexibility" (Pet. App. 59a).

The Commission confessed that this sweeping deregulation was "not free from doubt". (Pet. App. 157a). The Court of Appeals nevertheless affirmed (see *infra*).

D. The Decision Below

Petitioners sought review of the FCC order by the Court of Appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. Petitioner sought a stay *pendente lite*, and by order entered June 10, 1975, the Court of Appeals (Wright and MacKinnon, JJ.) stayed the FCC order pending appeal "to the extent that it authorizes the assignment or operation of radio spectrum space to Specialized Mobil[e] Radio Systems". It did not stay the portion of the order relating to private users (which is not at issue in this appeal), or to cellular systems which are not scheduled for operation in any form until at least 1978.[15]

On the merits, the Court of Appeals (Tamm, MacKinnon and Wilkey, JJ.), per Wilkey, Circuit Judge, affirmed the FCC order *in toto*. In substance, in a decision which we respectfully characterize as at least unusual, the court found as follows:

[15] On July 31, 1975, the Illinois Bell Telephone Company (an AT&T subsidiary) filed for authority from the FCC, pursuant to the instant decision, to construct and operate a commercial "cellular" mobile radio system in the Chicago metropolitan area, estimated to require an additional investment of at least $23.5 million through 1978. *In the Matter of Application of Illinois Bell Telephone Company,* File No. 20115-CD-P-(—)-76. This application is pending.

1. *On the Monopoly-Antitrust Issues:*

a. *AT&T.* The court below found that under the FCC order AT&T "is the likely recipient of a virtual monopoly in the operation of cellular systems"; that "this will result in significant increases in its market power"; that AT&T "appears likely to dominate substantially the field of radio telephone service, which has heretofore been occupied in significant part by small radio common carriers [the RCCs represented by petitioner] operating in a highly competitive environment"; that "[t]his threat [of AT&T dominance of radiotelephone service] is made more severe by the 1975 Order's elimination of a requirement that wireline operators offer to connect radio common carriers into their systems" (it found the FCC's decision to this effect unexplained and "somewhat puzzling");[16] that AT&T "will become a significant force in the now highly competitive market for private dispatch services";[17] and that the FCC provisions in the orders under review to minimize such anticompetitive behavior (principally relating to accounting) "likely . . . will prove largely cosmetic." (Pet. App. 11a-13a). The court nevertheless affirmed, stating that "we are

[16] AT&T's continuing resistance to the interconnection of its facilities with other communications systems has been ventilated in various forums. See, e.g., *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), cert. den. 95 S.Ct. 2620 (1975) (interconnection with specialized common carriers for FX and CCSA private line service); *Carterfone*, 13 F.C.C. 2d 420 (1968), recon. den. 14 F.C.C. 2d 751 (1969) (interconnection of private radio systems).

[17] The Court of Appeals further states that it "is unclear whether the authorization to engage in dispatch service is in violation of the 1956 Western Electric consent decree." But it affirms without deciding this issue.

not unaware of substantial anticompetitive effects which may become more apparent as the date for general implementation of the [cellular] systems draws nearer. . . . We make no comment upon the possible success of any antitrust actions which may in the future be brought". (Pet. App. 33a).

b. *Motorola.* The court found that the unprecedented authorization to Motorola to operate as a radio carrier on a vertically integrated basis is a "potential threat" to competition and to small radio carriers. (Pet. App. 30a). The court held that the FCC's authorization to Motorola "could discourage competition" and "may provide cause for independent antitrust actions". (Pet. App. 30a-31a). It nevertheless affirmed.

2. *On the Common Carrier Issue:* The court also affirmed the FCC order relieving entrepreneurial, for-hire, for-profit operators providing service to the public in the 30 MHz segment of the allocated spectrum (the SMRS) from the common carrier regulatory provisions of the Act. The FCC's basis for its action was its theory that it has the discretion to "confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve" (Pet. App. 26a), a theory which the FCC itself confessed is "not free from doubt" (Pet. App. 157a). The court below sustained the FCC's action on different grounds, neither considered nor discussed by the FCC: i.e., that these SMRS operators, although authorized to serve the public, might choose to serve only selected members of the public, and not to serve the public "indifferently". The court held that if the operators discriminate in this fashion among those seeking service from the public domain, they would not be "com-

mon carriers". The court conceded that the Commission's order *authorizes* the SMRS to serve the public generally, but it affirmed, stating that if the SMRS do so the order "will be open to renewed attack". (Pet. App. 33a).

3. *On the Preemption Issue:* The FCC preempted state jurisdiction on the grounds that it has discretionary power to do so in the interest of facilitating its overall plan, whether or not SMRS are considered to be common carriers. The court sustained preemption, but on a different ground: i.e., on the basis of its holding that the SMRS are not common carriers.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that an extraordinary number of reasons demonstrates that the writ of certiorari should issue:

A. In Summary

1. The importance of the case merits review by this Court.

2. The decision of the Court of Appeals is in conflict with decisions of this Court: *Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973) (the monopoly issue); *FPC* v. *Texaco, Inc.,* 417 U.S. 380 (1974) (deregulation); *SEC* v. *Chenery Corp.,* 318 U.S. 80 (1943) (principles of appellate review); *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963) and *Florida Lime and Avocado Growers* v. *Paul,* 373 U.S. 132 (1963) (preemption).

3. The decision of the Court of Appeals determines fundamental questions as to the interpretation and

application of the Communications Act of 1934 in conflict with that Act and applicable law.

4. The decision of the Court of Appeals determines questions of fundamental importance in the interpretation and application of the Communications Act of 1934, which have not heretofore been ruled upon by this Court, but should be decided by it.

5. The decision of the Court of Appeals affirms the preemption of state jurisdiction by agency decree in direct violation of the specific direction of the Communications Act of 1934 and in conflict with the rulings of this Court.

6. The decision of the Court of Appeals violates the fundamental *Chenery* rule: that a reviewing court may not affirm agency action on grounds radically different from those which impelled the action of the agency itself. This case demonstrates the reason for the rule (see *infra*).

7. The decision of the Court of Appeals is predicated upon an erroneous judgment as to the role of an appellate court reviewing an administrative rulemaking order of a regulatory agency: that is, instead of reversing agency actions which the Court of Appeals found to violate and to require and authorize violations of law, the court ordered that the agency's order should stand, subject to *future* challenge.

B. Argument

1. *Importance of the Case.* The FCC order is of fundamental importance to the mobile radio industry; to the 550 independent, small RCCs; to four million present users; to many public agencies; to American business enterprises which require access to the essen-

tial instruments of mobile radio communication and require it on non-discriminatory terms in order to compete; to basic antitrust and antimonopoly objectives of our law and national policy; to the definition and application of the "common carrier" concept which is fundamental to the Communications Act and other laws; to federal-state relations; to the interpretation and application of the Communications Act; and to the principles of judicial review of agency action.

2. *Conflict with Decisions of this Court.*

a. *Gulf States Utilities Co.* v. *FPC and the monopoly issue.* The statutory standard controlling FCC action is "public convenience, interest, or necessity". 47 U.S.C. § 303. In *Gulf States* this Court held that the "public interest" standard requires application of antitrust standards by administrative agencies as a "first line of defense against those competitive practices that might later be the subject of antitrust proceedings". 411 U.S. at 760. The decision below is in direct conflict with *Gulf States* which the court neither cites nor seeks to reconcile with its decision.

(1) *AT&T.* The Court of Appeals found that the FCC's order conferred a "virtual monopoly" of the cellular system on AT&T; that it bestowed upon AT&T substantial dominance in radiotelephone service to the prejudice of "small radio common carriers operating in a highly competitive environment"; that it enabled AT&T to "become a significant force in the now highly competitive market for private dispatch services"; and that it, without explanation, eliminated AT&T's obligation to provide interconnections. Nevertheless, the court held that this is not, "at this time, a breach of

the broad discretion allocated to the Commission". It asserted that "there will be ample opportunity to challenge anticompetitive effects as the time approaches when they will be felt". (Pet. App. 14a-16a).[18]

We submit, first, that, on the merits, this decision is in conflict with *Gulf States* and other decisions of this Court on the monopoly issue and with the specific antimonopoly provisions and policies of the Communications Act (47 U.S.C. §§ 313, 314); and second, that the Court of Appeals' "deferral" of the monopoly issue until after millions of dollars are spent on new facilities, many RCCs are driven out of business, vested interests are created, and much public injury has resulted—is in obvious disregard of the facts and in conflict with appropriate principles of appellate review (see *infra*).

(2) *Motorola, Inc.* The Court of Appeals found that the FCC's unprecedented authorization to radio equipment manufacturers and suppliers, especially to the dominant supplier, Motorola, also to engage in the business of providing carrier service on a vertically-integrated basis is a "potential threat" to competition and to small radio carriers, and "may provide cause for independent antitrust actions". (Pet. App. 30a-31a). But it inexplicably held that the authorization is justifiable because the threat "arises from economic power alone and not from any of Motorola's

[18] The court did not refer to, or comment upon the implications of, the Government's antitrust monopoly action against AT&T seeking to break up the Bell System for AT&T's monopolistic practices in this precise field. The Government's complaint explicitly covers AT&T's restrictive and monopolistic practices against the RCCs. See *supra*; Complaint (¶¶ 28(b), 29(c)) in *United States* v. *American Telephone and Telegraph Company, et al.*, D.C.D.C. Civ. Action No. 74-1698 (Nov. 20, 1974).

mobile radio-related activities." (Pet. App. 30a). The court notes that "independent antitrust actions" may be brought to challenge the anticompetitive effects resulting from the Commission's order.

We must respectfully suggest that this reasoning is insupportable and bewildering. The court does not question—it affirms—that the FCC order will vest Motorola with power to injure or destroy competition in mobile radio communications because of the vertical integration that it authorizes. *Cf., United States* v. *Paramount Pictures,* 334 U.S. 131, 174 (1948). This power is the direct consequence of the Commission's order. The court's conclusion is in conflict with established antitrust law and with *Gulf States Utilities Co., supra;* it is in violation of the "public interest" standard as construed by this Court; it is directly contrary to the provision of the Communications Act specifically providing that the antitrust laws are applicable to "manufacture and sale of" radio apparatus. 47 U.S.C. § 313. Further, the court's affirmance of the order with respect to Motorola on the basis that future "independent antitrust actions" may be brought is an erroneous view of the responsibility of an appellate court reviewing agency action.

We respectfully submit that the reviewing court is not justified in affirming agency action in the face of antitrust findings such as those in this case, and remitting the parties and the public interest to possible remedies after the damage is done.

b. *FPC* v. *Texaco, Inc., and deregulation.* In affirming the Commission's extraordinary departure from the mandate of the Communications Act in the interests of deregulation, the Court of Appeals does not

cite or discuss this Court's holding in *FPC* v. *Texaco, Inc.,* 417 U.S. 380 (1974). In that case, on the basis of a rulemaking proceeding and a public interest rationale of much greater force than in the present case, the FPC had substituted for the rate regulation procedures and standards of the Act (15 U.S.C. §§ 717c and 717d), a "regulatory plan" by which adjustments and refunds would be made in the rates charged by small producers of natural gas if the market prices realized were unreasonably high. This Court set aside the FPC's order. It ruled that the FPC does not have the power "to set at naught an explicit provision of the Act" (417 U.S. at 394), or to substitute for regulatory jurisdiction which the Act mandated, a scheme by which the market place would be the regulator (precisely what the FCC purports to do in the present case). 417 U.S. at 395-399. As Mr. Justice White observed, writing for the unanimous Court, the Act "does not say a little unlawfulness is permitted". 417 U.S. at 399.

In the present orders, the FCC does not even purport to comply with the Act by substituting a different type of regulation. It boldly affirms that its purpose is completely to deregulate: in the Commission's words, "to shed this heavy cloak [common carrier provisions of the Act] and exchange it for one with far greater flexibility". (Pet. App. 59a). To achieve this goal, the FCC created a category of entrepreneurs which, as the Court of Appeals stated, "are not required to behave and thus be regulated, as common carriers". (Pet. App. 29a). The Commission totally relieved the for-hire for-profit purveyors of entrepreneurial communications services to the public (the SMRS) from the substantive and procedural regulations of the Act: from the hearing requirements—frequencies are to be assigned on a "first-come, first-served" basis (Pet. App.

7a); from the requirement that their charges, practices, etc., be just and reasonable (47 U.S.C. § 201(b)); from the prohibition against unjust or unreasonable discrimination in charges, practices, etc., and unreasonable preferences (47 U.S.C. § 202(a)); from state jurisdiction and oversight over intrastate operations (47 U.S.C. §§ 152(b) and 221(b)); from the required showing of character and financial qualifications (47 U.S.C. § 308(b)); from the prescribed public notice and waiting period (47 U.S.C. § 309(f)); and from the right of parties in interest to contest license applications (47 U.S.C. § 309(d)). *Cf. Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945).

It did so in the interests of a grand design to promote more effective use of the spectrum, as it conceived of it, and to avoid procedural burdens. But neither these nor any other objectives sanction Commission defiance of the statute. It is supposed to administer the statute, not to violate or rewrite it. As stated by this Court in *Texaco:* "The Commission may have great discretion as to how to insure just and reasonable rates, but it is plain enough to us that the Act does not empower it to exempt small producer rates from compliance with that standard." 417 U.S. at 394.

c. *Head* v. *New Mexico Board of Examiners; Florida Lime and Avocado Growers* v. *Paul; preemption.* This Court has repeatedly insisted that federal preemption of state authority is a power that must be exercised only in clear cases and upon a clear showing. The test is that state statutes may not be preempted unless there is found "'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' *Florida Lime and Avocado*

Growers v. *Paul,* 373 U.S. 132, 141, 83 S.Ct. 1210, 1217."[19] The congressional design in the present case is precisely the opposite. It affirmatively prescribes state jurisdiction which is the basic regulatory machinery of the Act. And certainly, there is no evidence of "actual conflict between the two schemes of regulation." They have existed side-by-side for more than 30 years during which the industry has experienced remarkable growth and development and public service has expanded spectacularly.

Obviously, this is in precise contradiction of the standards set by this Court (*supra*). The Commission rested its decision to "preempt" on the grounds of "federal primacy"—a claim of power which violates our concepts of federal-state relationships and the clear directions of this Court.

The Court of Appeals affirmed the Commission's preemption order, but on a somewhat different ground. The court held that since the Commission had excluded the SMRS, as a matter of federal law, from regulation as common carriers, "it follows that any state regulation inconsistent with the policy adopted may be pre-empted". As we shall discuss, the court's basic premise—that the Commission may validly exclude the SMRS from regulation under federal law—is clearly incorrect. They are "common carriers" and must be subjected to regulation under federal and state law as such. In any event, we submit that agency preemption of state authority in a rulemaking proceeding, prior to any experience, is at least suspect. In fact, if the SMRS are not common carriers, preemption would be idle and unnecessary since the state regulatory statutes apply only to "common carriers." If the SMRS are

[19] *Head* v. *New Mexico Board of Examiners, supra,* 374 U.S. at 430.

common carriers, as we submit, preemption is a subversion of the clear, explicit mandate of the Communications Act and can, at best, be explained as based upon anticipated convenience and not upon the "actual conflict" required by this Court's standard.

d. *SEC* v. *Chenery Corp: rule governing appellate review of agency action.* As we have described, the Court of Appeals sustained the Commission's decision to deregulate the SMRS, but it rejected the Commission's basis for deregulation. The Commission held that it had discretionary authority to classify operators as common carriers or non-common carriers. The Court of Appeals emphatically rejected this claim of "unfettered discretion in the Commission to confer or not confer common carrier status" (Pet. App. 26a). But it then proceeded to support the Commission's conclusion by holding that the SMRS are not common carriers. Its basis was that, although the order authorized the SMRS to serve the public, they might choose not to do so, but to serve only selected customers.

The Commission, however, proceeded on the principle, an essential part of its design, that service to the public—to the vast category of potential users—would be provided by the SMRS. It assumed that the SMRS would offer its service "to whatever public its service may legally and practically be of use" (Pet. App. 23a). It made no other provision for general public access to the vast public domain which it allocated, except for the cellular systems which are not expected to be in operation until the 1980s.

The Court of Appeals, seeking a way to affirm the deregulation order, undermined this basic part of the Commission's order. In effect, the court's action would penalize any SMRS that offered to serve the public generally. It would then, according to the court, be

operating as a common carrier, and since it would not be in compliance with the regulatory provisions of the Act and of state law, it would be operating illegally.

The court's decision that the SMRS are not common carriers is incorrect, as we shall show. But, apart from this, its grounds for sustaining deregulation are in clear conflict with the principle which this Court has characterized as "a simple but fundamental rule of administrative law," *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), namely, that "an administrative order cannot be upheld unless the grounds upon which the agency acted . . . were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943).

3. *The Common Carrier Issue.* The Court of Appeals sustained the Commission's deregulation of entrepreneurs authorized to serve the public on a for-hire, for-profit basis (SMRS) on the grounds that they are not "common carriers" as defined in the Act, although, the court stated, they might become common carriers if, as authorized by the Commission's order, they should in practice offer to serve the public generally.[20] The Court conceded that "it is undisputed that they [the SMRS] would be permitted [under the Commission's order] so to hold themselves out if they desired" (Pet. App. 26a); but it concluded that this "is not a sufficient basis for imposing the burdens that go with common carrier status." (*Ibid.*).

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[20] The Commission's second order purported to restrict the SMRS to provide service only to "eligibles" under Parts 89, 91 and 93 who may qualify for "private user" status. But these "eligibles" include virtually all conceivable members of the public who might seek mobile radio service. The Court of Appeals rejected the obviously spurious and insupportable suggestion that this device converts the SMRS into some sort of "private" rather than "public" carrier (Pet. App. 23a).

The definition of "common carrier" (47 U.S.C. § 153(h)) is an issue of recurring importance under the Communications Act.[21] It is also of great importance with respect to the administration of other regulatory statutes, such as the Interstate Commerce Act, the Federal Aviation Act and the Shipping Act, particularly in light of the current public debate concerning deregulation. This Court has not ruled upon the question for purposes of the Communications Act, but should do so.

We respectfully submit that the decision of the court below is clearly in error. The SMRS, under the FCC's order, are authorized and expected to serve the public. Where an entrepreneur is granted a franchise to serve the public under the Act, he is *obliged* to serve the public. The Communications Act provides that a common carrier must serve the public "upon reasonable request". 47 U.S.C. § 201(a). Classification as a common carrier does not depend upon whether he in fact fulfills the obligation that is implicit in his license to serve the public. It may be true that common carrier status can be voluntarily incurred by performance, i.e., by offering service to the public; but it does not follow, logically or legally, that voluntary *non*-performance

[21] See, e.g., *National Association of Regulatory Utility Commissioners* v. *FCC*, No. 75-1075, — U.S. App. D.C. —, — F.2d — (February 10, 1976) (use of cable television access channels for two-way point-to-point non-video communications service is common carriage); *Frontier Broadcasting Co.* v. *Collier*, 24 F.C.C. 251 (1958) and *Philadelphia Television Broadcasting Co.* v. *FCC*, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966) (conventional CATV systems not common carriers); *Computer Inquiry*, 28 F.C.C. 2d 267 (1971) (establishing standards for distinguishing between data processing services and common carriage involving data communications); *Industrial Radiolocation Service*, 5 F.C.C. 2d 197 (1966) (radiolocation service not communications common carriage).

relieves a common carrier of his responsibilities to be licensed and regulated under law.

The Communications Act contains no provision for exempting common carriers from its regulatory provisions. It contains no provision for "contract" carriers who may pick and choose among the public to be served. On the contrary, it permits only the licensing of operators for their own private use, on a single or cooperative basis, or as common carriers to serve the public without discrimination and on "reasonable request".[22]

The FCC recognized that the "entrepreneur-operated" SMRS "could be licensed as common carriers and regulated under Title II of the Communications Act" (Pet. App. 54a). It decreed that it would not do so on the grounds that it had discretion to make such a decision—a conclusion which it admitted was "not free from doubt". The Court of Appeals rejected its claim of "unfettered discretion", but then erroneously proceeded to construct a definition which, if allowed to stand, would undermine the fundamental purpose of the common carrier requirement: to require indiscriminate service to all of the public in exchange for the right to use the public domain "for-profit" and "for-hire", on an entrepreneurial basis.

We submit that the decision below is in error and that it is of such great importance that this Court should review the issue.

4. *The Preemption Issue.* As discussed above, the FCC's claim of power to preempt, and the Court of Appeals' refusal to reverse its preemption decision, are

[22] See, e.g., *United States* v. *Drum*, 368 U.S. 370, 375, 376 (1962) (Motor Carrier Act of 1935) (application of the concept requires "reference to the clear but broad remedial purpose of a regulatory statute committed to agency discretion").

clearly erroneous. This is a recurring issue of vital importance which this Court should review.[23]

5. *The Function of Appellate Review.* This Court should grant review of the question precipitated by the decision of the court below: the function of an appellate court reviewing an administrative order in a rulemaking proceeding: *viz.*, whether it is the reviewing court's duty to decide the issues presented, and not to rubber-stamp agency action, despite substantial infirmities, on the grounds that future private or administrative action may be available.[24]

The Court of Appeals in this case made findings of palpable departures by the FCC from the mandate of the Communications Act and the law with respect to

[23] The FCC's power to preempt state regulation is also being addressed by Courts of Appeals in various other current or pending cases where the FCC has recently asserted such power. See, e.g., *National Association of Regulatory Utility Commissioners* v. *FCC*, No. 75-1075, — U.S. App. D.C. —, — F.2d — (February 10, 1976) (FCC preemption of state jurisdiction over cable television leased access channels used for two-way point-to-point non-video communications services set aside); *Telerent Leasing Corp.*, 45 F.C.C. 2d 204 (1974), appeal pending *North Carolina Utilities Commission* v. *FCC*, No. 74-1220, *et al.*, (4th Cir.) (FCC preemption of state jurisdiction over telephone station equipment); *AT&T*, 56 F.C.C. 2d 14 (1975), appeal pending *California Public Utilities Commission* v. *FCC*, No. 75-2060, *et al.*, (D.C. Cir.) (FCC preemption of state jurisdiction over FX and CCSA private line service interconnection); *Interstate and Foreign Message Toll Telephone Service*, 56 F.C.C. 2d 593 (1975), appeal pending *North Carolina Utilities Commission* v. *FCC* No. 76-1002, *et al.*, (4th Cir.) (FCC preemption of state jurisdiction over customer-provided telephone equipment).

[24] The Administrative Procedure Act, 5 U.S.C. § 706(2), provides that a reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law; . . . in excess of statutory jurisdiction, authority or limitations, or short of statutory right".

the antitrust component of the "public convenience, interest or necessity" standard of the Act and its common carrier requirements. But the Court of Appeals refused to set aside the Commission's order on the apparent grounds that attack should await implementation of the order.

The Court of Appeals says that the cellular system allocation "may be subject to successful challenge at some future date" (Pet. App. 16a); it affirms the unprecedented authorization to Motorola to obtain licenses to operate base stations and to deploy its vertically integrated power, which, it acknowledges, "could discourage competition" and "may provide cause for independent antitrust actions" at a later date; it holds that the FCC order authorizes the SMRS to operate as common carriers, and that if "SMRS in practice behave as common carriers," the FCC's order "will be open to renewed attack". (Pet. App. 33a). Despite all of these infirmities, the Court of Appeals affirmed.

Petitioner submits that the court's affirmance of the FCC's order, despite this extraordinary series of legal infirmities in the order, and its insistence that effective judicial review must wait until the damage is done, is a novel and important restriction of the function and duty of a reviewing court in a rulemaking proceeding which should be reviewed by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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